

**BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA**

Marge Campbell,	)	Case No. 9401006058
	)	
Charging Party,	)	
	)	
versus	)	<b>Hearing Examiner's</b>
	)	<b>Proposed Decision</b>
A.W.A.R.E., Inc.,	)	
	)	
Respondent.	)	

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER**  
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**I. PROCEDURE AND PRELIMINARY MATTERS**

On August 20, 1993, charging party filed a verified charge of discrimination with the Montana Human Rights Commission. On January 31, 1994, charging party refiled the verified charge of discrimination, making the same allegations. On June 21, 1995, charging party filed an amended charge of discrimination, making essentially the same allegations and additionally claiming discrimination because of sex (female) as well as age. All three charges are Case No. 9401006058, which is this contested case. Charging party alleged that respondent denied her equal employment opportunity because of her sex (female) and age (DOB 2-7-37) and in violation of §49-2-303 MCA. The charges were certified for hearing on September 5, 1995. The undersigned was appointed hearing examiner.

By agreement of the parties, this contested case was set and called for hearing at the conference room of the Anaconda Local Development Group, Community Service Center Building, 118 E. 7th Street, Anaconda, Montana. The hearing was held May 21, 22 and 23, June 3 and 4, and June 20, 1996. Witnesses were excluded on the motion of charging party.

Counsel appeared and acted on behalf of each party: Peter Michael Meloy, Meloy & Morrison, for charging party, and Joseph C. Connors Sr. and Joseph C. Connors, Jr., Connors Law Firm, for respondent. Charging party, Marge Campbell, was present. Respondent designated Larry Noonan as its representative to attend hearing.

Respondent's request for administrative notice of MCA §§53-20-102, 204, 205 and 301

1 through 304, and A.R.M. §§11.12.101, 115, 205 through 208, 236, 246 and 413 A.R.M.; and  
2 46.8.722 was granted without objection.

3 Witnesses and exhibits are listed in the Witness Docket and Exhibit Docket of June 24,  
4 1996. Copies are attached to this proposed decision for convenience. The exhibit labels  
5 denominate the parties as "Plaintiff" and "Defendant." In this decision, as in the docket and the  
6 record, the exhibits of charging party ("CP") and respondent ("R") are referenced.

## 7 **II. ISSUES**

8 The issues to be addressed are set forth in the Final Prehearing Order, May 16, 1996, pp.  
9 5-7. Reduced to simpler form, the question is whether her employer took Marge Campbell's job  
10 and offered her a lesser position at a lower wage because she was a fifty-six year old female.  
11 There are facts from which an inference of discrimination can be drawn. Is the legitimate  
12 business purpose offered by respondent a pretext?

## 13 **III. FINDINGS OF FACT**

14 1. The stipulated facts are found as facts. The charging party is Marge Campbell. She is  
15 female, and a resident of Big Fork, Montana. Her date of birth is February 7, 1937. Respondent  
16 is A.W.A.R.E., Inc., a Montana corporation doing business in Montana. Charging party  
17 commenced employment for respondent in Anaconda, Montana, on April 1, 1976. In August,  
18 1992, Larry Noonan (Executive Director), hired Geri Allick. On or about February 10, 1993,  
19 Charging Party's position as office manager was for 40 hours a week at \$12.50 per hour. Final  
20 Prehearing Order, p. 2, lines 6-14.

21 2. Respondent was started in 1976, with an initial goal of providing work training and  
22 experience for developmentally disabled adults. The corporation's purpose grew into provision  
23 of services for developmentally disabled persons and their families. Exhibit CP 2.

24 3. A.W.A.R.E., Inc., had grown substantially over the years. When Campbell first  
25 started as office manager in 1976, the first executive director was the only other employee.  
26 When Noonan became executive director in the fall of 1988, the organization had one group  
27 home, a day-work program, and 12 or 13 employees. The total revenue budgeted for the 1989  
28 Fiscal Year was \$261,178.00. With increasing state interest in "deinstitutionalization" of  
developmentally disabled persons, A.W.A.R.E., Inc., obtained more contracts and larger

1 commitments to delivering services. In early 1991, A.W.A.R.E., Inc., was able to obtain  
2 commitments from the state for the construction of five group homes--two in Anaconda for  
3 developmentally disabled persons, and three in Butte for developmentally disabled adolescents.  
4 Hiring of staff preceded the construction itself. The total projected budget by FY 1993 was well  
5 in excess of a million dollars. Testimony of Noonan. Exhibit R DD.

6 4. With the growth of the corporation, Marge Campbell's job of office manager had  
7 evolved into a substantial list of responsibilities:

- 8 a. She prepared budgets for A.W.A.R.E., Inc.'s use internally and with the  
contracting governmental agencies;
- 9 b. She prepared financial statements of A.W.A.R.E., Inc.;
- 10 c. She maintained the ledgers for internal bookkeeping;
- 11 d. She billed the revenue sources for services rendered;
- 12 e. She maintained the accounts payable records for A.W.A.R.E., Inc.;
- 13 f. She maintained the accounts receivable records for A.W.A.R.E., Inc.;
- 14 g. She maintained the inventory records and ordered supplies;
- 15 h. She accounted for client funds (clients' money from government agencies);
- 16 i. She maintained and generated the payroll records;
- 17 j. She supervised office staff under Noonan;
- 18 k. She handled communication between Noonan and the projects and operations;
- 19 l. She did office clerical tasks--typing, reception duties and appointment  
20 scheduling within the office.

21 Testimony of Campbell and Noonan.

22 5. Marge Campbell functioned, for years, at a level of sophistication and expertise higher  
23 than her education and experience would lead a reasonable employer to expect. She had a high  
24 school diploma and night classes at the Butte Business College as her educational background.  
25 She had also worked in a bookkeeping position at Dunn and Bradstreet some years before, and  
26 was "trained by the state" to keep ledgers. During her years at A.W.A.R.E., Inc., Anderson  
27 Zurmuillen "reset" the bookkeeping methods from pegboard to ledger. Campbell was given  
28 some instruction on how to handle the "reset" books. Her limited training in accounting was  
enough for the small business accounting methods which the corporation initially used. But as  
the business grew, the technical demands of her job also grew. Testimony of Campbell, Berry,  
Noonan and Allick. Exhibits R CC and R TTT.

6. Larry Noonan testified that there were no significant problems with Campbell's  
performance--she was a loyal, cooperative and productive employee. This is confirmed by her  
evaluations. Testimony of Noonan and Campbell. Exhibit CP 1. As her job grew, Campbell

1 continued to be a loyal, cooperative, productive employee. In order to do this, Campbell worked  
2 extra hours and faced increasing stress. Testimony of Campbell.

3 7. Marge Campbell was an excellent employee. She did good work because of her 17  
4 years of experience within A.W.A.R.E., Inc. She did it by spending extra hours (she estimated  
5 two to four extra hours every week, on average) to complete the work. She did it with limited  
6 supervision and direction, without adequate formal education or training. She did it because she  
7 enjoyed her work, the sense of value and significance it gave her, and because of her loyalty to  
8 and personal identification with A.W.A.R.E., Inc. Because she did good work without the  
9 benefit of adequate formal training and supervision, there were increasing problems with the  
10 sufficiency of the accounting methods of the corporation. These problems were not Campbell's  
11 fault so much as the inevitable result of the growing demands placed upon her. Testimony of  
12 Campbell, Berry, Micheletti and Noonan, Exhibits CP 11 and CP 13.

13 8. In 1990, Marge Campbell asked Larry Noonan if she could start to accrue overtime  
14 instead of compensatory time. She was increasingly struggling with the financial record keeping  
15 and reporting. In the fall of 1990, A.W.A.R.E., Inc., hired Carrie Conn. Conn was a good  
16 employee and did help, but there was still a periodic need for Campbell to work extra hours in  
17 order to complete her duties. Conn remained employed at A.W.A.R.E., Inc., until the fall of  
18 1991. Testimony of Campbell.

19 9. In the fall of 1991, A.W.A.R.E., Inc., undertook the process of hiring a person whom  
20 Campbell understood to be a replacement for Conn. Campbell sat in on the interviews. Noonan  
21 testified that the person to be hired was not to be Campbell's assistant, but rather someone with  
22 the education and background to take over Campbell's duties in payroll and accounting.  
23 Respondent hired Kathy Hickey. Noonan directed Hickey and Campbell to divide Campbell's  
24 existing duties. Campbell accepted this. It did bother her, and was the beginning of the mistrust  
25 toward Noonan which would grow over the remaining time of her employment. Testimony of  
26 Campbell and Noonan. Exhibit CP 7.

27 10. Before the fall of 1992, the "team" of Hickey and Campbell was unable to revamp,  
28 computerize and run the expanded fiscal system at A.W.A.R.E., Inc. Noonan decided another  
specialist was needed. He already had received an inquiry from a very well qualified young

1 woman, Geri Allick, and had invited her to submit a letter and resume. Respondent advertised a  
2 position in 1992, and hired Allick in August of that year. Testimony of Noonan, Campbell and  
3 Allick. Exhibits CP 22 and CP 24.

4 11. Throughout the early 1990's, Campbell continued to view her job, in effect and  
5 function, as one of assistant executive director. Noonan relied upon his staff to provide technical  
6 expertise in their various areas of responsibilities. Campbell believed that she also could rely  
7 upon Hickey, and later Allick, to perform the technical accounting and computer work. She  
8 believed she could supervise the accounting functions which she had been struggling to perform.  
9 Campbell welcomed the addition of more technically trained staff. Testimony of Campbell.  
10 Preparing the minutes of the August 19, 1992, Area Managers' Meeting, Marge Campbell  
11 reported that she would no longer be doing accounting or payroll and noted parenthetically,  
12 "there is a GOD." Exhibit CP 29.

13 12. The hiring of the specialists did not work out as Campbell had envisioned it. With  
14 Allick's hiring in the fall of 1992, three people were employed to do the work that Campbell had  
15 previously been assigned. Her role in the office diminished because of Noonan's increased  
16 reliance upon Hickey and Allick. Campbell was hurt and confused. She was no longer doing  
17 most of the tasks which had been her job. She even lost her desk, and was moved down to the  
18 floor below, a receptionist location. She felt exiled, untrusted, demoted and victimized. The  
19 scope of her involvement in company business narrowed substantially. She struggled with fear  
20 and suspicion about what was happening. Testimony of Campbell.

21 13. In late 1992 and early 1993, A.W.A.R.E., Inc., experienced a severe financial crisis.  
22 In November of 1992, the payroll checks bounced. Within a few days, enough money was  
23 received to cover the checks, but Executive Director Larry Noonan was unable to obtain a clear  
24 explanation from his office staff as to why this happened. He sought financial help from the  
25 government agencies funding A.W.A.R.E., Inc.'s programs. The agencies were willing to help,  
26 but required an immediate analysis of what was wrong and how it could be fixed. Testimony of  
27 Campbell, Noonan, Hudson, Hanshew and Lovelace.

28 14. The analysis presented a stark picture. The Department of Social and Rehabilitation  
Services and the Department of Family Services of the State of Montana arranged an audit or

financial review of the records of A.W.A.R.E., Inc., in December of 1992 and January of 1993.

Walt Berry, Audit Manager of the State Audit and Compliance Bureau, projected, with no additional unforeseen problems, that A.W.A.R.E., Inc., on June 30, 1993, would be short by approximately \$107,300.00 in meeting FY 1993 expenditures. Testimony of Berry, Exhibit CP 46.

15. In his report to the Administrator of the Developmental Disabilities Division of the Department of Social and Rehabilitation Services, Berry stated his opinion that A.W.A.R.E., Inc., had the capability and operating latitude to reduce expenses without negatively affecting services, to overcome the projected deficit. Testimony of Berry, Exhibit CP 46. The agencies wanted the corporation to survive. Otherwise, considerable problems in placing clients would result.

Testimony of Hudson, Hanshew and Lovelace.

16. The corporation's funding sources effectively dictated the acceptable means of recovery. On January 21, 1993, the Directors of the Department of Family Services and the Department of Social and Rehabilitation Services wrote to A.W.A.R.E., Inc., after reviewing Berry's audit report. They concluded the financial condition of A.W.A.R.E., Inc., did not appear to be sound. They told the corporation that to survive it must take immediate actions to restructure debt and reduce expenditures. The Directors requested that A.W.A.R.E., Inc., submit by February 8, 1993, a plan that would balance its budget without adversely impacting the individuals being served by the corporation. The funding agencies would not accept reductions below certain levels of ratios of staff to clients or of wages of direct service staff. These agencies were major funding sources for A.W.A.R.E., Inc. Without continued support from them, A.W.A.R.E., Inc., would not survive in any case. Testimony of Noonan, Hudson, Hanshew, Berry and Lovelace. Exhibits CP 46 and R H.

17. Noonan prepared a plan which he believed did not impact client services but did eliminate the deficit. On February 9, 1993, A.W.A.R.E., Inc., submitted its plan to reduce expenditures and restructure debt without adversely impacting services. The funding agencies concluded that the plan was workable, with some changes which did not relate to cuts in salaries and personnel. Testimony of Noonan, Hudson, Hanshew, Berry and Lovelace. Exhibit R J. The Board of Directors of A.W.A.R.E., Inc., approved the plan. Testimony of Noonan and Smith.

1 18. The final plan involved elimination of four staff positions. Campbell's office  
2 manager position was eliminated. The service and support coordinator position of Theresa  
3 Nordholm, another female employee over age 40, was eliminated. Kathy Hickey's accountant  
4 position (to which she had been demoted at the end of December, 1992) was eliminated. A male  
5 bus driver over forty had his part-time driver position eliminated. Testimony of Campbell,  
6 Nordholm and Noonan. Exhibits CP 53 and R J.

7 19. Respondent offered other positions to Campbell, Nordholm and the male bus driver.  
8 Respondent offered Campbell a newly created administrative assistant position at \$8.00 an hour.  
9 Respondent offered Nordholm a direct services position at a lower wage, which she accepted.  
10 Respondent shifted a probationary employee who had been in that position to a "relief" spot.  
11 Respondent placed the male bus driver in a similar "relief" position as a driver. Testimony of  
12 Campbell, Nordholm and Noonan. Exhibits CP 53 and CP 55.

13 20. Respondent terminated Kathy Hickey. Noonan testified at hearing that this was a  
14 reduction in force termination, a lay-off. However, in responding to Montana Human Rights  
15 Commission staff investigative inquiries, A.W.A.R.E., Inc., reported that Hickey had been fired  
16 for unsatisfactory job performance. Exhibit CP 67. Noonan's testimony at hearing about the  
17 alleged "lay-ff" was not credible. Hickey's performance deficiencies helped cause the financial  
18 crisis. Geri Allick was assuming most of her duties (and would soon take over all of them).  
19 A.W.A.R.E., Inc., utilized the elimination of Hickey as a savings which could be plugged into its  
20 financial plan. Treating her discharge as a lay-off unrelated to her performance also gave her a  
21 better chance at finding future employment, and may have given her an entitlement to  
22 unemployment insurance benefits. Treating her firing as a lay-off was mutually beneficial to  
23 employer and employee, but Respondent nonetheless fired her. Testimony of Campbell and  
24 Noonan.

25 21. Respondent reduced hours, wages, or both, for a number of other employees,  
26 including Noonan, whose cut in pay was a disciplinary action by the Board. A.W.A.R.E., Inc.,  
27 projected that the cuts, together with other changes in accounting and spending, would prevent

28 <sup>1</sup> The pertinent portion of this exhibit was whited out by the Commission staff, to protect the privacy of a  
non-party (Kathy Hickey). Noonan was ordered to testify about it. He admitted A.W.A.R.E., Inc., told the  
Commission that Hickey had been fired for poor performance.

1 the massive short-fall predicted by the audit for the end of June, 1993. Some of the cuts in hours  
2 and wages which were included in the plan were reorganizations which would have occurred  
3 even without the financial crisis, as part of the restructuring necessitated by the opening of new  
4 group homes and restaffing resulting from the corporation's overall increase in service delivery.  
5 Testimony of Campbell, Noonan and Allick, Exhibits R GG and R HH.

6 22. The implemented plan was not the only method the corporation could have selected to  
7 resolve its financial problems. Other available options included reducing wages across the board,  
8 eliminating different or fewer employee positions and questioning the accuracy of the projected  
9 deficit. Cross-examination of the agency witnesses, the accountants and Noonan did demonstrate  
10 other possible alternatives.

11 23. Noonan credibly testified that business reasons weighed against the other alternatives.  
12 Reduction of wages across the board would have been directly contrary to the efforts of the  
13 funding agencies to get higher wages for the direct service staff of such providers as A.W.A.R.E.,  
14 Inc. A.W.A.R.E. did pay higher than minimum wages for its direct service staff. Reductions in  
15 those wages could also have seriously damaged morale, as well as leading to higher turn-over in  
16 direct care staff. Reducing the wages of the remaining accountant, Geri Allick, would have  
17 risked the loss of the one member of the small administrative staff in whom Noonan had  
18 confidence. Allick also was the best qualified of the administrative staff. Exhibit CP 22.  
19 Elimination of other employees appeared to Noonan to create problems for adequate staffing and  
20 assumption of additional duties by remaining employees. Challenging Berry's conclusions would  
21 have required additional expense and delay to obtain an alternative explanation of the problems.  
22 Testimony of Noonan, Hudson, Hanshew, Berry, Lovelace, Micheletti and Allick.

23 24. Marge Campbell refused to accept the administrative assistant position. Had she  
24 accepted the job, it would have meant a cut in pay of \$4.50 per hour. She believed she was being  
25 unfairly treated. She filed a grievance, in accord with the corporation's procedures. Noonan  
26 refused the grievance, on the grounds that the action taken against her was not disciplinary and  
27 therefore not grievable. Campbell saw changes in her job duties which had occurred before the

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28 <sup>2</sup> Geri Allick, during her testimony, demonstrated that she is knowledgeable, capable and reliable. Mr. Noonan's reliance upon her and concern about losing her was credible.



1 financial crisis as part of a long-term plan to get rid of her. Her Human Rights complaint  
2 followed. Testimony of Campbell and Noonan, Exhibits CP 53, CP 55, CP 57, CP 57A, CP 58  
3 and CP 60.

4 25. Before the financial crisis, Noonan had been in the process of reorganizing the  
5 corporation. He asked for and obtained job descriptions from the employees. He tried various  
6 changes in job titles and duties. He attempted to fit existing employees into appropriate slots and  
7 to identify needs for which additional employees might be hired. Testimony of Noonan.  
8 Exhibits CP 4, CP 6, CP 7, CP 18, CP 26 and R Y. The minutes of various manager and staff  
9 meetings also demonstrate the adjustments of jobs and duties through which Noonan was  
10 attempting to meet the growing demands the corporation faced.

11 26. In February of 1992, Respondent hired Greg Micheletti, a private accountant, to help  
12 create a computerized and effective fiscal management system for the growing company.  
13 Micheletti suggested to Noonan that Marge Campbell was overpaid for the job she now had.  
14 This was before the hiring of Allick, and the further reduction in Campbell's duties. Micheletti  
15 also testified that Larry Noonan said he intended to make a lateral transfer with Campbell, to a  
16 niche in which she could continue to benefit the corporation and earn her salary.

17 27. Prior to the financial crisis, A.W.A.R.E., Inc., had at least once acted to avoid  
18 reducing the wages of employees in reorganizations. The exact time of this action was not  
19 established. The evidence does demonstrate that the prior action involved expansion rather than  
20 reduction in force. A.W.A.R.E., Inc., in its growth had added more direct care employees for  
21 delivery of services to the developmentally disabled clientele. In that expansion, a uniform base  
22 wage was set for each level of direct care staff. Applying these changes to one existing employee  
23 would have resulted in a reduction from his existing wage, because of his length of service. The  
24 corporation made an exception in order to maintain his existing wage base. Testimony of  
25 Campbell, Nordholm and Noonan.

26 28. Marge Campbell was selected as one of the employees subjected to adverse action in  
27 the financial crisis plan because she was not involved in direct care and could be demoted (in

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28 <sup>3</sup> The exhibit docket identifies these meetings. There are minutes from at least sixteen such meetings  
in the record.

practical effect) without immediate impact upon delivery of services. Campbell could be conveniently subjected to adverse action rather than lateral transfer. She was at risk. She was at risk because of the growth of the company, the hiring of specialists for the financial management and record-keeping, and because her new position in the reorganized company had not been established prior to the financial crisis. None of these factors were related to her age or her sex.

#### IV. OPINION

This case involves a company that grew rapidly. In the expansion, it began to hire specialists to assume some of the duties of a generalist office manager, Marge Campbell. She was a long-time employee who had spent years doing important work for A.W.A.R.E., Inc. Her work-load outgrew her capacity. She needed help. She wanted to stay in her generalist role, involved in virtually every phase of the business, working with or perhaps even supervising the specialists. She did not see a need to ask for or obtain more specialty training herself. When asked why she did not seek training on computer and/or accounting techniques and methods, she testified that she did not feel she needed such training.

Marge Campbell, a capable generalist, was one of the victims of fiscal belt-tightening. The victims of the cut-backs were disproportionately women and older employees. But in the particular circumstances of Campbell's case, the corporation has proved that it made a decision based upon legitimate business reasons. Those reasons are not pretextual. It is more likely than not that Campbell lost her job (and was offered a position with reduced pay and reduced importance) because the corporation honestly chose a financial plan that included eliminating her job, not because of her age or sex.

The elements of a prima facie case are:

- (1) Proof that charging party was in the group (or groups) protected by the Act;
- (2) Proof that charging party was subjected to adverse employment action;
- (3) Proof that at the time of the adverse action, charging party was performing the job at a level that met the employer's legitimate expectations; and
- (4) Proof from which an inference can be drawn that charging party's status (within the protected group or groups) caused the adverse action.

*See, e.g., Tonack v. Montana Bank of Billings*, 258 Mont. 247, 854 P.2d 326 (1993);

1 **Crockett v. City of Billings**, 234 Mont. 87; 761 P.2d 813 (1988); **Martinez v. Yellowstone**  
2 **County Welfare Dept.**, 192 Mont. 410, 768 P.2d 850 (1981).

3 Marge Campbell was a woman over the age of 40 at the time of the adverse action over  
4 forty. Respondent cut her wages by about one-third. Respondent offered her, upon the  
5 elimination of the job she had held for over seventeen years, a lower paid position with less  
6 status within the organization. Adverse action was taken against her.

7 There is ample evidence that Marge Campbell was struggling to perform the increasing  
8 technical and complex tasks associated with the finances of the organization. Her difficulties  
9 (and requests for help) prompted the corporation to hire people with more specialized training  
10 and expertise to assume many of her duties. These actions predated the financial crisis and were  
11 not adverse to Campbell. The corporation considered her job performance to be satisfactory, as it  
12 certainly should have. The change in her duties, which in part she welcomed, resulted both from  
13 the increase in the weight of those duties as the organization grew and from dissatisfaction with  
14 her performance through no fault of her own.

15 Under the **McDonnell Douglas** standards, the charging party's prima facie case creates,  
16 through indirect or circumstantial evidence, "an inference that an employment decision was  
17 based on a discriminatory criterion illegal under the act." **Teamsters v. United States**, 431 U.S.  
18 324, 358 (1977). The elements of a prima facie case will vary according to the charge made,  
19 **McDonnell Douglas**, 411 U.S. at 804, n. 13, but in each case it serves a critical function, "it  
20 eliminates the most common nondiscriminatory reasons" for the adverse action by the employer.  
21 **Burdine**, 450 U.S. at 254. Charging party took exception to the hearing examiner's statement of  
22 the fourth element of the first tier of the **McDonnell Douglas** prima facie case (charging party's  
23 Exceptions to Pre-Trial Order, May 20, 1996). Since the proposed decision determines that  
24 charging party has established a prima facie case, this exception is moot.

25 Marge Campbell has satisfied the requirements of establishing a prima facie case. She  
26 presented evidence from which the fact-finder could decide that she was subjected to age  
27 discrimination, sex discrimination, or both. Three of the adversely affected employees were  
28 older women (including Marge Campbell). There is evidence of a prior policy of going to  
"extreme lengths" to avoid reducing wages of existing employees in restructurings. A younger

employee with less seniority in administration (Geri Allick) was not subjected to adverse actions.

Allick and Noonan assumed Campbell's remaining duties when she left employment.

But A.W.A.R.E., Inc., has offered a legitimate business reason for the adverse action. There were other choices the corporation could have made instead. However, the business reasons presented by an employer to justify its RIF decisions are not required to be well-advised, but merely true. **Donaldson v. Merrill Lynch & Co.**, 794 F.Supp. 498, 505 (S.D.N.Y. 1992).

The crux of this case is pretext. Campbell's charges stand or fall upon whether the Respondent has satisfactorily explained why this individual employee was selected for adverse action. Taken individually, every decision A.W.A.R.E., Inc., made about Marge Campbell was reasonable. The decision to hire help because she was struggling to complete her work was reasonable in 1990, when Carrie Conn was hired. The decision to find someone with more expertise and experience in accounting was reasonable in 1991, when Kathy Hickey was hired. The decision in 1992 to hire Geri Allick was entirely reasonable. Even the shifts in responsibility, by which most of Campbell's responsibilities were taken from her, were each reasonable. There is no sinister cast to the series of decisions which stripped Campbell of most of her responsibilities and put her "on the bubble" when the need for reduced expenses arose.

Campbell attempted to raise an issue about the obligation of the employer to provide her with training or at the least the opportunity to be trained in more sophisticated accounting. That is not an issue in this case. It is clear from Marge Campbell's testimony that until her job was eliminated, she welcomed transfer of accounting and financial management duties to others. She did not want training.

The proprietary feeling that Campbell had toward A.W.A.R.E., Inc., is understandable given her years of service and unflagging efforts to do more than a reasonable employer could expect of her. But this feeling was not based upon her real job status. Because the financial crisis came at the very time when her duties had been decreased the most, she was a logical target for a reduction in force decision. It was reasonable for A.W.A.R.E., Inc., to include in its plan of action the elimination of Marge Campbell's job.

Campbell claims that Noonan has fabricated his testimony that Campbell was not being set up for discharge when her job duties were shifted to Hickey and then to Allick. A statement

1 to his own accountant in 1992 (before the financial crisis and the RIF decisions) about his  
2 intentions for Campbell rebuts the claim of recent fabrication. It is more likely than not that  
3 Noonan was contemplating creating a position for Campbell which would have justified her  
4 \$12.50 per hour wage, and would have retained for her the level of responsibility which she had  
5 earned. Before this job could be designed, the corporation was confronted with the directives of  
6 its funding agencies. To satisfy the demands of those agencies, cuts had to made. Campbell was  
7 one of the victims of those cuts.

8 Despite damaging his own credibility by taking occasional incredible positions, Larry  
9 Noonan was generally a credible witness. So was Marge Campbell. But the overwhelming  
10 evidence supports two general findings. (A) There was an immediate financial crisis to which an  
11 immediate cost-cutting response was required. (B) Selection of Marge Campbell's existing job  
12 for elimination was supported by legitimate business reasons.

13 Loyalty to a long-time employee who has performed very well under sometimes difficult  
14 circumstances is not required when business necessity arises. Larry Noonan has presented a  
15 plausible explanation for preserving and soon increasing Geri Allick's wages while substantially  
16 reducing Marge Campbell's. The choice the corporation made may have been repugnant, but it  
17 was not illegal discrimination. When there are too many people in the lifeboat, a rational and  
18 unbiased decision about whom to toss overboard is defensible.

## 19 **V. CONCLUSIONS OF LAW**

20 1. Marge Campbell has established a prima facie case that A.W.A.R.E., Inc.,  
21 discriminated against her.

22 2. A.W.A.R.E., Inc., has proved a legitimate, nondiscriminatory reason for the adverse  
23 action taken against her.

24 3. Respondent was suffering from a financial crisis, and the decision to take adverse  
25 employment action against charging party as part of the response to the crisis was not  
26 discriminatorily based on her age or sex.

27 4. Respondent's business reason was not a pretext for unlawful discrimination against  
28 charging party.

5. The conduct of respondent does not mandate any relief.

## VI. PROPOSED ORDER

1. Judgment is found in favor of respondent, A.W.A.R.E., Inc., and against charging party, Marge Campbell, on the charge that respondent denied her equal employment opportunity because of her sex and age and in violation of §49-2-303 MCA.

2. The three complaints consolidated in this contested case are dismissed with prejudice.

Dated: July 11, 2001.

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Terry Spear, Hearing Examiner  
Montana Human Rights Commission

### Certificate of Mailing

A true copy of the foregoing order dated July 11, 2001, was served upon the persons named below by means of first class mail on the date indicated.

Peter Michael Meloy  
MELOY & MORRISON  
P.O. Box 1241  
Helena, Montana 59624-1241

Joseph C. Connors, Sr.  
CONNORS LAW FIRM  
212 E. Park Ave.  
Anaconda, Montana 59711

Signed this \_\_\_ day of \_\_\_\_\_, 1996.

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Secretary, Montana Human Rights Commission